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No. 83-665

IN THE

Supreme Court of the United States

October Term, 1983

BUFFALO TEACHERS FEDERATION, *et al.*,
Petitioners,

vs.

GEORGE ARTHUR, *et al.*,
Respondents,

and

THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, NEW YORK, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM FOR RESPONDENT IN OPPOSITION

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Question Presented

Should this Court grant a petition to review a decision of the Second Circuit Court of Appeals which affirmed the District Court's balancing of the equities in favor of vindicating the constitutional rights of minority race children rather than protecting the seniority rights of majority race teachers when determining the hiring and layoff policies to be implemented as a part of a systemwide school desegregation remedy?

TABLE OF CONTENTS.

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	ii
The Facts	1
Reasons for Not Granting the Writ	2
Conclusion	5

TABLE OF AUTHORITIES.

CASES:

Arthur v. Nyquist, 415 F. Supp. 904 (W.D.N.Y. 1976)	2
Arthur v. Nyquist, 573 F. 2d 134 (2nd Cir. 1978) Cert. denied *sub nom.*	2
Chance v. Board of Examiners, 534 F. 2d 993 (1976) Cert. denied 431 U.S. 965 (1977)	3
Green v. County School Board of New Kent County, Va., 391 U.S. 430 (1968)	5
Manch v. Arthur, 439 U.S. 860 (1978)	2
Morgan v. O'Bryant, 671 F. 2d 23 (1st Cir. 1982) cert. den. 103 S. Ct. 62 (1982)	4
Oliver v. Kalamazoo Board of Education, 706 F. 2d 757 (1983)	3
Stotts v. Memphis Fire Dept., 679 F. 2d 541 (1982) cert. granted June 6, 1983	4
Swann v. Board of Education, 402 U.S. 1	5

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MEMORANDUM FOR RESPONDENT IN OPPOSITION

The Facts

Petitioner's "Statement of the Case" (Petition 5-7) when read with the statement of facts reported by the Second Circuit (App. 3a *et seq.*) is adequate for purposes of this response.

Reasons for Not Granting the Writ

The particular circumstances which led to the development and implementation of the faculty and staff portion of the remedial plan to fully desegregate the Buffalo Public School System (BPSS) justifies the decision of the Second Circuit and that decision is not in conflict with any decision of the Sixth Circuit; nor does it present any important question of federal law.

As a part of the 1976 liability findings the District Court ruled that the Board "... purposely followed a policy that has segregated, and was intended to segregate, the teacher and administrative staffs in the Buffalo Public Schools." *Arthur v. Nyquist*, 415 F. Supp. 904, 946 (W.D.N.Y. 1976). Upon appeal the Second Circuit, affirming, observed:

> "We are unable to imagine a set of facts, short of a public admission of wrongdoing, which would be more suggestive of intentional discrimination.
>
> * * *
>
> "No policy, save segregation itself, can consistently explain the pattern of transfers, zoning, optional attendance areas, staff recruitment and assignment, and general obstructionism which marks the actions of the City appellants."
>
> *Arthur v. Nyquist*, 573 F. 2d 134, 145 (2nd Cir. 1978) Cert. denied *sub nom.*
>
> *Manch v. Arthur*, 439 U.S. 860 (1978).

Following the above decisions and direction given by the District Court in an order issued March 26, 1979, Respondent Board prepared a plan, with the assistance and agreement of Plaintiffs, which was designed to assure that the minority race children found to be the victims of past discrimination would not attend schools with segregated faculty, staff and administrators.

Despite several attempts by Petitioners to halt implementation of the plan, it has been in operation, with some revision, since September 1979 and was approved, with further modification, by the Second Circuit on July 22, 1983 (App. 3a).

In reaching its decision the Second Circuit acknowledged the predicament of the Respondent Board:

> The District Court's March 26, 1979 order mandating one-for-one hiring to reach a twenty-one percent minority target placed the Board in a dilemma. At least for the foreseeable future, the Board had no obvious means of obeying the order without violating the seniority system established by statute and collective bargaining agreement (App. 7a).

The Second Circuit (App. 14a) then applied to the circumstances before it the precise standard used by the Sixth Circuit in *Oliver v. Kalamazoo Board of Education*, 706 F. 2d 757 (1983) and distinguished (App. 13a fn. 5) its own prior decision in *Chance v. Board of Examiners*, 534 F. 2d 993 (1976) Cert. denied 431 U.S. 965 (1977). Moreover, the Second Circuit concluded that the decision of the District Court was not clearly erroneous and that, except in the area of recall, the District Court had correctly balanced the individual and collective interests involved.

The Second Circuit was clearly correct in affirming the District Court's conclusion that, based upon the violation found, equity favored vindication of the constitutional rights of the minority race children of Buffalo when the alternative was to ignore or deny those rights and instead favor the rights of the majority race teachers who, but for the past segregatory acts found to have been engaged in by their employer, would not have been

in a position to claim greater seniority rights than the teachers employed consistent with the March 26, 1979 guidelines.

Respondent Board of Education has no present quarrel with the Opinion of the Second Circuit. Since 1976 respondent Board has been committed to the good faith effort to remove all vestiges of past discrimination and has co-operated with the parties and the Court in affecting appropriate remedial plans. Consistent with the rulings of the Court, respondent Board has not permitted collective bargaining agreements or state laws to thwart the effort to achieve unitary status even while attempting to minimize conflict with them.

As observed by the Second Circuit:

> Here, the fact that the Federation (Petitioner) has a seniority system should not be allowed to prevent or inordinately delay the achievement of a fully desegregated school system for the children of Buffalo (App. 13a).

Respondent Board has no desire to present this matter for review by this Court. No cause exists for this Court's supervision. The Court is already addressing the employment discrimination issue in *Stotts v. Memphis Fire Dept.*, 679 F. 2d 541 (1982), cert. granted June 6, 1983, and has declined an opportunity to review the appropriateness of requiring desegregation of faculty and administration as a part of the vindication of the rights of minority children in a school desegregation case (See *Morgan v. O'Bryant*, 671 F. 2d 23 (1st Cir. 1982), cert. den. 103 S. Ct. 62 (1982)).

There is no conflict between the Second and Sixth Circuit growing out of the Second Circuit's application of the Sixth Circuit standard. The difference in *result* is clearly warranted by the facts, including the comparative

gravity of the violation found. Both Circuits adhere to a policy of examining the prescribed relief to see if it is "necessary to correct constitutional violations." (App. 14a).

In *Green v. County School Board of New Kent County, Va.*, 391 U.S. 430, 435 (1968) this Court advised that racial identifiability of faculty, staff, student body, facilities, extra curricular activities and transportation are among the indicia of a "dual" school system (See also *Swann v. Board of Education*, 402 U.S. 1, 18).

As revealed by the District Court in its order dated May 23, 1983 the Buffalo Public School System is on the brink of success in achieving court approved desegregation goals.

The effort of Respondent Board of Education to fully desegregate its faculty and staff and thereby complete the task of dismantling the dual system is unreasonably fettered if the use of the desegregative tools afforded by the District Court and affirmed by the Second Circuit is withdrawn.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

January 1984

Respectfully submitted,

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